LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 12 19[illegible]
JAMES R. BROWNING, Clerk

BRIEF FOR THE PETITIONER

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 104

WILLIAM VINCENT VITARELLI,
Petitioner,

v.

FRED A. SEATON, Secretary of the Interior of the United States, HARRIS ELLSWORTH, Chairman, FREDERICK J. LAWTON, and BARBARA BATES GUNDERSON, Members of the Civil Service Commission of the United States,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

CLIFFORD J. HYNNING
1821 Jefferson Place, N. W.
Washington 6, D. C.
Counsel for Petitioner.

Of Counsel:
HARRY E. SPROGELL
SAUL, EWING, REMICK & SAUL
Packard Building

INDEX

PAGE

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 3

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 4

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 13

THE ARGUMENT 16

ARGUMENT I

THE DEFAMATORY DISMISSAL OF PETITIONER UNDER THE WRONGFUL AUTHORITY AND WITHOUT ANY BASIS OF RECORD WAS NO MERE ERROR IN "LABELLING", AS HELD BY THE COURT BELOW, BUT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO PURSUE HIS PROFESSIONAL CALLING FREE OF ANY "BADGE OF INFAMY." 18

ARGUMENT II

WHERE RESPONDENTS VOLUNTARILY EXPUNGED THE RECORD OF ALL STATEMENTS ADVERSE TO PETITIONER, THEIR REMOVAL OF PETITIONER CANNOT SUBSEQUENTLY BE JUSTIFIED ON THE GROUND THAT THE RECORD FURNISHED A "RATIONAL" FOUNDATION FOR FINDING PETITIONER UNTRUSTWORTHY 22

ARGUMENT III

AT THE TIME OF PETITIONER'S SUSPENSION AND REMOVAL, RESPONDENT SEC-

PAGE

RETARY HAD LIMITED HIS AUTHORITY TO REMOVE PETITIONER AS A "SECURITY RISK" ONLY IN ACCORDANCE WITH HIS OWN DEPARTMENTAL SECURITY REGULATIONS 24

A. THE SECURITY CHARGES FURNISHED PETITIONER WERE NOT SUFFICIENTLY SPECIFIC IN THEIR WORDING TO ENABLE PETITIONER, ON THE ASSUMPTION OF INNOCENCE TO DEFEND HIMSELF 25

B. A CONCEDEDLY LOYAL EDUCATOR CANNOT BE REMOVED FROM A NONSENSITIVE POSITION AFTER A HEARING SOLELY UPON THE BASIS OF UNDISCLOSED INFORMATION FURNISHED BY SECRET INFORMANTS 27

C. THE SO-CALLED HEARING WAS NOT A FAIR HEARING 29

D. PETITIONER WAS NOT FURNISHED WITH FINDINGS OF FACT OR A WRITTEN STATEMENT OF THE DECISION TO REMOVE HIM "IN THE INTEREST OF THE NATIONAL SECURITY," NOR WAS HE INFORMED WHICH SPECIFIC CHARGE, IF ANY, HAD BEEN USED AS A BASIS FOR EFFECTING HIS REMOVAL 30

ARGUMENT IV .....

WHERE THE LEGAL BASIS CONTEMPORANEOUSLY USED TO REMOVE PETITIONER FAILS, AS HERE CONCEDED, THE REMOVAL ITSELF MUST FAIL, AND PETITIONER IS ENTITLED TO REINSTATE-

PAGE

MENT, NOTWITHSTANDING HIS LACK OF STATUTORY JOB PROTECTION 32

CONCLUSION 36

CITATIONS

CASES:

Adler v. Board of Education, 342 U.S. 485, 96 L. Ed. 517, 72 S. Ct. 380 (1952) 19

Alabama State Federation of Labor v. McAdary, 325 U. S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945) 36

Alpert v. Board of Governors, 286 App. Div. 542, 145 NYS 2d 534 (1955) 20

Bailey v. Richardson, 86 U. S. App. D.C. 248, 182 F. 2d 46; 341 U. S. 918, 95 L. Ed. 1352, 71 S. Ct. 669 (1951) 20, 21

Blackmar v. United States, 128 Ct. Cls. 693, 120 F. Supp. 408 (1954) 27

Cole v. Young, 96 U. S. App. D. C. 379, 226 F. 2d 337 (1955) 24, 32

Cole v. Young, 351 U. S. 536, 100 L. Ed. 1936, 76 S. Ct. 861 (1956) 14, 20, 24, 32

Columbia Auto Loan Co. v. Jordan, 90 U.S. App. D. C. 222, 196 F. 2d 568 (1952) 18

Deak v. Pace, 88 U. S. App. D. C. 50, 185 F 2d 997 (1950) 26

Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 70 L. Ed 494, 46 S. Ct. 215 (1925) 18

Gonzales v. United States, 348 U. S. 407, 99 L. Ed. 467, 75 S. Ct. 409 (1955) 30

In re Carter, 89 U. S. App. D. C. 310, 192 F. 2d 15 (1951) cert. den. 342 U. S. 862, 96 L. Ed. 648, 72 S. Ct. 89 18

It re Isserman, 348 U. S. 1, 99 L. Ed. 1, 75 S. Ct. 6 (1954) 18

PAGE

Interstate Commerce Commission v. Louisville & Nashville Railroad Co. 227 U. S. 88, 57 L. Ed. 431, 33 S .Ct. 185 (1913) 28

Jencks v. United States, 353 U.S. 657, 1 L. Ed. 2d 1103, 77 S. Ct. 1007 (1957) 28

Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, L. Ed. —— S. Ct. —— (1951) 3

Konigsberg v. State Bar of California, 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722 (1957) 18

Kutcher v. Higley, 98 U. S. App. D. C. 278, 235 F. 2d 505, (1956) 31, 32

Leiner v. United States, —— Ct. Cls. —— (1958) 14

Manning v. Stevens, 93 U. S. App. D. C. 225, 208 F. 2d 827 (1953) 26

Money v. Anderson, 93 U. S. App. D. C. 226, 208 F. 2d 34 (1953) 26

Morgan v. United States, 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773, (1938) 28

Mulligan v. Andrews, 93 U. S. App. D. C. 381, 211 F. 2d 28 (1954) 31

Parker v. Lester, 227 F. 2d 708 (9th Cir. 1955) 18

Perkins v. Elg, 307 U. S. 35, 83 L. Ed. 1320, 59 S. Ct. 884 (1939) 25

Peters v. Hobby, 349 U.S. 331, 99 L. Ed. 1129, 75 S. Ct. 790 (1955) 9, 20; 28

Roviaro v. United States, 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957) 28

Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L. Ed. 2d 795, 77 S. Ct. 752 (1957) 18

Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80, 87 L. Ed. 626, 63 S. Ct. 454 (1943) 35

Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947) 22

PAGE

Service v. Dulles, 354 U.S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152 (1957) 15, 20
Simmons v. United States, 348 U. S. 397, 99 L. Ed. 453, 75 S. Ct. 397 (1955) 27
Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7 (1915) 18
Vitarelli v. Seaton, — U.S. App. D. C. — 253 F. 2d 338 (1958) 2, 12, 13
Wieman v. Updegraff, 44 U.S. 183, 97 L. Ed. 216, 73 S. Ct. 215 (1952) 18, 19, 20
Yick Wo v. Hopkins, 118 U. S. 356, 30 L. 2d. 220, 6 S. Ct. 1064 (1886) 22

CONSTITUTION OF THE UNITED STATES:

Fifth Amendment 4, 14

STATUTES:

Act of August 26, 1950, 64 Stat. 476 5 U.S.C. 22-1 ..... 2, 13, 14, 17, 18, 23, 33
Foreign Service Act, 22 U.S.C. 801 et seq. 14, 16
Lloyd-LaFollette Act, 37 Stat. 555 (1912), 5 U.S.C. 652 (1932) 14, 16, 23, 26
Veterans Preference Act, 58 Stat. 387, 5 U.S.C. 863 ..... 14, 16, 23

REGULATIONS:

Department of the Interior, Order No. 2738 (Appendix A) 1, 2, 4, 15, 24, 25, 33, 34, 35, 36
Executive Order 10450, 18 Fed. Reg. 2484 (1953) (Appendix A) 1, 2, 4, 10, 13, 17, 18, 23, 33, 34, 35, 36
Morgan, Robert J., "Federal Loyalty-Security Removals, 1946-1956," 36 Nebraska Law Review 412-46 (1951) 26

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 101

WILLIAM VINCENT VITARELLI,
Petitioner

v.

FRED A. SEATON, Secretary of the Interior of the United States, HARRIS ELLSWORTH, Chairman, FREDERICK J. LAWTON, and BARBARA BATES GUNDERSON, Members of the Civil Service Commission of the United States,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum of the Secretary of the Interior suspending petitioner under the purported authority of the Act of August 26, 1950, E. O. 10450 and Department Order 2738 is printed at R. 3-6. The "findings and final determination" of respondent Secretary, dated September 2, 1954, ordering the termination of petitioner's employment "in the interest of national security," is printed at R. 29-31. The order of the District Court, dated October 29, 1956, is unreported and is printed at R. 37-38. The

opinion of the Court of Appeals is reported at 253 F 2d. 338 and is printed at R. 38-45.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1958. On May 5, 1958, Chief Justice Warren issued an order ex parte extending the time to file petition for certiorari until June 13, 1958. R. 47. The petition for a writ of certiorari was filed on June 12, 1958, and granted on October 27, 1958. R. 48.

QUESTIONS PRESENTED

In filing his suit in the District Court petitioner sought (i) a declaratory judgment that his suspension and removal by respondent Secretary as a "security risk" under the purported authority of the Act of August 26, 1950, E. O. 10450, and Department Order 2738 be set aside as illegal and void, and (ii) a mandatory injunction directing petitioner's reinstatement to his position as educational officer in the Department of the Interior, with all the rights incident thereto. Respondents thereupon voluntarily expunged the records of the Department of the Interior and the Civil Service Commission of "all adverse statements with respect to plaintiff as a 'security risk' under Executive Order 10450." The case was heard on cross motions for summary judgment at the conclusion of which the District Judge granted summary judgment for respondents on the ground that the court could not order the reinstatement of an employee whose tenure "is only at the will of the employing Government." R. 37. The Court of Appeals affirmed on the ground that the treatment accorded petitioner "was in no way arbitrary, or lacking in due process", that he "was legally discharged, even though the proceedings were improperly labelled," and that the voluntary expunging of the records, which had already been effected, was "the maximum relief" to which

petitioner was entitled. R. 42-44. The questions presented are:

1. Whether a defamatory "security risk" removal violates petitioner's constitutional rights where made under wrongfully invoked authority or merely amounts to what the court below termed "improperly labelled" proceedings against an employee lacking statutory job rights?

2. Whether, in the latter event, a finding of "untrustworthiness" by respondent Secretary, purportedly made in a "security" proceeding, survives a voluntary expunging by respondents of all records of "any adverse statements" with respect to the termination of petitioner's employment, so as to furnish a "rational" foundation for removal and denying petitioner reinstatement?

3. Whether respondent Secretary, have specifically subjected petitioner to the formalities of a hearing conducted "in the interest of the national security," furnished petitioner with (a) charges stated with sufficient specificity so as to enable petitioner, on the assumption of innocence, to prepare an adequate defense, and (b) a fair and impartial hearing free from partisanship?

4. Whether the "security risk" dismissal of a concededly loyal educator from a "non-sensitive" position—involving no element of the national security—can be effected after the formalities of a "hearing" solely on the basis of secret reports?

5. Whether respondent Secretary, who had discharged petitioner in 1954 as a "security risk", confessedly under the wrongfully cited authority, could discharge petitioner again two years later (1956) after the institution of this suit in the District Court by the device of issuing a predated second discharge paper and expunging the references to petitioner's being a "security risk," or is petitioner entitled first to reinstatement?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves:

(1) The Fifth Amendment to the Constitution of the United States, printed in Appendix A, *infra*, p. 38.

(2) E. O. 10450, issued April 27, 1953, printed in Appendix A, *infra*, pp. 38-39.

(3) Department of the Interior Order No. 2738, Security Regulations, dated November 9, 1953, printed in Appendix A, *infra*, pp. 40-45.

STATEMENT OF THE CASE

This case comes to this Court from the affirmance of the order of the trial court which granted respondent's motion for summary judgment, dismissed the complaint, and denied petitioner's motion for summary judgment. R. 37-38.

Neither party introduced testimony in the trial court.[1]

Petitioner, a citizen of the United States, residing in Erwinna, Bucks County, Pennsylvania, is a professional educator, holding a doctor's degree from Columbia University, who was employed by the Department of the Interior in the Education Department of the Trust Territory of the Pacific Islands, at Koror in the Palau District. Under the general employment policy of the Government for overseas personnel outside the Foreign Service, peti-

[1] Save for such references to a newspaper clipping (R. 1-2), the letter of charges (R. 3-6), and the transcript of the so-called hearing before the security hearing board as are necessary to explain how this case arose, the statement of the case is based on the facts of record. The essentials of the security hearing were also set forth in testimony before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on November 23, 1955, and printed as part of its proceedings pursuant to S. Res. 94, 84th Congress, 2nd Session, pp. 653-71.

tioner held a so-called "Schedule A" position excepted from the classified civil service, had completed his trial period, and held an "indefinite appointment."[2] Petitioner's duties consisted of administering and fostering an educational program for the native people of the Palau District of the Trust Territory, including teacher training and the preparation of teaching materials. R. 8. He had rendered full and completely satisfactory service in his position as education and training specialist, which he had held for some three years, had received official ratings of "satisfactory" and "excellent," and had secured from his superiors many favorable commendations, which were presented in evidence to the so-called security hearing board. R. 9. At the time of his suspension in 1954, petitioner was receiving a salary of $6,140 per year plus 25% overseas differential. Respondents have conceded that his position at no time had been designated a "sensitive position." R. 19.

Petitioner first learned of his probable suspension from the headlines of a Guam newspaper under date of March 13, 1954 (R. 12), which stated: "Security Probe in Trust Isles—Five Employees Will Be Ousted as 'Bad Risks,'" and listed one as a "known conscientious objector" who as "an advocate of pacificism is out of place in so sensitive and strategic an area as the Trust Territory." This public reference to petitioner, whose pacificism was well known

---

[2] The record contains the text of a so-called "employment agreement" (R. 26-29) which was designed to protect the Government in the matter of travel expenses by requiring petitioner to reimburse the Government in the event he cut his overseas employment short of the minimum term of two years. It has nothing whatever to do with petitioner's tenure in the Department of the Interior. According to the testimony of the personnel officer of the Department of the Interior, who originally effected the employment of petitioner, as reported in an official "Transcript of Proceedings" on November 14, 1955, "The mere fact that the minimum period required of Dr. Vitarelli as basis for his transportation would not in itself act to terminate his employment." P. 27.

in the Islands, thus commenced the official defamation of petitioner. While petitioner's pacificism was not subsequently cited in the formal charges against him, it still remained the subject of probing at the hearing before the so-called security hearing board. Approximately one month later, on or about April 3, 1954, petitioner received an abstract of a letter from respondent Secretary, suspending him, without at that time stating any of the charges. The full text of the letter setting forth certain charges against him was received on or about April 8, 1954. R. 3-6.

The formal charges listed against petitioner may be summarized as follows: (1) During the years 1941-45 he was either a member of, affiliated with, or in sympathetic association with the Communist Party, and members of the Communist Party, including sympathetic association with three named individuals [para. 2(a)(1)];

(2) That in 1945 he had registered a preference for the American Labor Party in New York City [para. 2(a)(2)];

(3) That while teaching at Teachers College of Columbia University he had subscribed to the U. S. S. R. Information Bulletin and had purchased copies of the Daily Worker and the New Masses [para. 2(a)(3)];

(4) That a statement submitted by petitioner under oath in 1952 with respect to his associations with two named individuals did not fully divulge his associations with such individuals in that his association with one individual was "not casual" as he stated in 1952, but on the contrary was one of "an intimate friendship," that his association with another individual was not limited solely in connection with his teaching profession, and that he knew both individuals to be "members of, affiliated with, or in sympathetic association with the Communist Party and numerous Communist front organizations" [para. 2(a)(4)]; and

(5) That his behavior, activities and associations tend to show him "not reliable or trustworthy" and that the foregoing allegations furnish reason to believe that he had "deliberately misrepresented, falsified or omitted material facts" in connection with his behavior, activities and associations, and that the same may "also furnish reason to believe that [petitioner] may be subjected to coercion, influence, or pressure" which may cause him "to act contrary to the best interests of national security." [Para. 3]. Petitioner was also advised of his right to answer and request a hearing within 30 days.

When petitioner requested travel authority to proceed from Koror to Washington, D. C., he was initially denied such authority "at Government expense unless resigning." R. 9. After seeking to borrow travel funds in Koror, petitioner was later authorized to proceed to Washington at Government expense for the purpose of answering the charges. Perforce petitioner left his wife and four children in Koror where they remained separated from him by thousands of miles for many months, dependent upon such funds as petitioner could send from his scanty earnings on odd jobs in the Washington area, while he prepared for his defense to the charges, attended the hearings, and waited for the decision of respondent Secretary, with all the attendent difficulties of familial communications over half the world during these most trying days for petitioner.

Petitioner filed with respondent Secretary a written answer, together with 44 affidavits concerning his loyalty and character, but was informed on June 11, 1954, that there were not "sufficient grounds to reinstate" him. On June 22 and July 1, 1954, petitioner, together with counsel and four witnesses, appeared before a so-called security hearing board. R. 10. Petitioner was not confronted with any evidence against him and did not have the right to subpeona witnesses, or to cross-examine his accusers,

whoever they might be. Nor was he given the text of the statements that had allegedly been made against him.

In his testimony petitioner categorically denied membership in or affiliation or sympathetic associations with the Communist Party or its sympathizers and gave a complete, candid and factual explanation of the matters contained in the written charges. The security officer of the Department of the Interior conceded on the record that, petitioner's loyalty was not in issue, as appears from the following exchange:

> "Mr. Olmsted [then counsel for appellant]: * * * Does Mr. Armstrong [then assistant solicitor and security officer, Department of the Interior] question his loyalty to the United States?
>
> Mr. Armstrong: No, I think I perhaps didn't elaborate my very first statement this morning sufficiently. * * * Of course, in the *Oppenheimer* case the board recommended to AEC to dismiss him as a security risk although they said he was perfectly loyal.
>
> Mr. Olmsted: That is why I am asking here, is it agreed that he is perfectly loyal or should I produce some evidence that he is perfectly loyal?
>
> Chairman Towson [who presided at hearing]: The only thing before this Board is incorporated in the letter of charges. As I recall he is not charged with disloyalty.
>
> Mr. Armstrong: That is right. The question is only whether he is a security risk." [Transcript of hearing, pp. 175-76].

The conclusion from the foregoing is obvious that the representative of the Department of the Interior at the so-called security hearing said twice that petitioner's loyalty was not in question.

The transcript of the hearing shows that petitioner was examined in particular on whether he thought the security

program was a Republican plot to get rid of Democrats,[3] on racial equality,[4] on discrimination against Jews,[5] on whether he had "heard of a great variety of organizations which were not listed in the letter of charges,[6] on Black Mountain transcendentalism,[7] whatever that may be, on his votes for President and Vice-President, on whether he was "quite happed up over the one-world idea,"[9] and whether he was "still [i.e., June 1954] a "strong advocate" of the United Nations."[10]

On September 2, 1954, respondent Secretary issued his "Findings and Final Determination" (R. 29-31) that it

---

[3] "Mr. Armstrong [then assistant solicitor and security officer for the Department of the Interior]: Do you think that the Security program undertaken by Executive Order 10450 is politically inspired from the Republican administration?" Transcript, p. 15.

[4] "Mr. Armstrong: What were your feelings at that time [1943] concerning race equality?" Ibid., p. 24.

[5] "Mr. Armstrong: Do I interpret your statement correctly that maybe Negroes and Jews are denied some of their constitutional rights at present?" Ibid., p. 32.

[6] "Mr. Armstrong: Do you recall an organization by the name of National Council for Soviet-American Friendship? * * * How about the Southern Conference for Human Welfare? * * * What is the organization called the Joint Anti-Fascist Refugee Committee? * * * Have you ever had any contact with the Negro Youth Congress? * * * How about Abraham Lincoln Brigade? * * Did you become active in the Progressive Party in that year (1948)? * * * Have you ever heard of a magazine called 'Cooperative Union'? * * * I was wondering whether you had ever heard of Consumers Union?" Ibid., pp. 98, 100, 101, 102, 103, 112, 113.

[7] "Mr. Armstrong: Do you know what Black Mountain transcendentalism is?" Ibid., p. 97.

[8] Infra., pp. 29-30.

[9] "Mr. Armstrong: The file indicates, too, that you were quite hepped up over the one-world idea at one time; is that right?" Ibid., p. 131.

[10] "Mr. Armstrong: At one time, or two, you were a strong advocate of the United Nations. Are you still?" Ibid., p. 132.

was "advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954," without stating which of the charges, if any, were sustained against him. Petitioner's employment was terminated as of the close of business on September 10, 1954. Standard Form 50 of the United States Civil Service Commission, entitled "Notification of Personnel Action," was issued under date of September 21, 1954 (R. 31-32), designating the personnel action with respect to petitioner as "TERMINATION" and "being taken in accordance with the provisions of Executive Order 10450." This completed the process of labelling petitioner "a security risk."

Subsequent to the removal of petitioner, his original counsel (who has remained of counsel until his recent judicial appointment), was officially informed by the Solicitor of the Department of the Interior that petitioner had been removed because of an investigative report which had been received at the Department of the Interior after the filing of the formal letter of charges, which did not necessarily reflect the contents of such investigative report. R. 11-12. An entirely different explanation was later given to petitioner's original counsel by the personnel officer for the Trust Territories of the Department of the Interior to the effect that petitioner had not been removed for any subversive association or activity, but because petitioner had exhibited "lack of common sense" during his employment by the Department of the Interior in the South Pacific in permitting his children to freely associate with native children. R. 12.

By petition presented to the then Undersecretary of the Interior on October 25, 1955, petitioner applied for reinstatement or a rehearing, which was denied on May 11, 1956. On June 12, 1956, petitioner by his counsel made a written demand upon respondent Secretary to restore him

to duty forthwith in accordance with the decision of this Court in *Cole* v. *Young*, 351 U.S. 536, 100 L. Ed. 1396, 76 S. Ct. 861 (1956), but respondent Secretary failed to comply with this demand, whereupon petitioner brought action in the United States District Court for the District of Columbia on July 10, 1956.

Pursuant to the Rules of Civil Procedure, petitioner gave notice to respondents for the taking of oral depositions of certain officials of the Department of the Interior and the Civil Service Commission, listing specific matters of inquiry as peculiarly within the knowledge of respondents. The scope of the discovery and the opposing reasons were, inter alia, set forth by petitioner and respondents as follows:

A. Petitioner's discovery.	B. Respondents' reasons for opposing discovery.
7. Why was not plaintiff simply removed without charges, without procedures and without infamy in view of his lack of competitive status under a Schedule A appointment?	7. and 8. . . . These questions clearly relate to matters which are hypothetical and immaterial. The only relevant legal issue herein is whether the procedures in fact employed by the defendant Secretary in accomplishing plaintiff's discharge were legal and valid. Neither the existence of any other procedure which could have been used to discharge plaintiff nor the reason why it was not in fact employed can have any possible relevance herein.
8. Why did defendant Secretary insist upon imposing "a badge of infamy" on plaintiff by making a finding that the employment of plaintiff be "terminated in the interest of the national security" under the purported authority of E. O. 10450 and the Act of August 26, 1950?	

On October 1, 1956, noting the above quoted language of respondents in 7 and 8 "on the understanding that this is a concession of record and binds the Defendants not to depart from that position," petitioner thereby withdrew his opposition to respondents' motion for a stay of discovery proceedings and filed a cross motion for summary judgment.

On October 10, 1956, respondents filed in the District Court an affidavit by the personnel officer of the Office of Territories in the Department of the Interior, who stated that she had custody of the personnel file of petitioner and that "Standard Form 50 attached hereto and made a part hereof is a true copy of the official document reflecting the termination of William Vincent Vitarelli from a position under the jurisdiction of said Office of Territories." R. 32. This attached form (R. 33-34) was an exact duplicate of Form 50 which had been issued to petitioner in 1954 (R. 31-32), except for the deletion under "remarks" of the sentence referring to action being taken pursuant to E. O. 10450. There is nothing on the face of this new Form 50 to show that it was not issued on September 21, 1954, or that it was issued in fact sometime in October, 1956.

On October 16, 1956, the case was heard on cross motion for summary judgment, at the conclusion of which United States District Judge James W. Morris ruled that he would grant summary judgment for the respondents because he questioned whether he possessed the power to order the reinstatement of a governmental employee whose tenure was at the will of the employing department and as such excepted from the protection available to employees in the classified civil service (R. 34-38). The Court of Appeals affirmed the case on February 13, 1958 (R. 38-46).

The Court of Appeals has held: (a) that while a governmental employee lacking statutory job protection is "en-

titled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds," the treatment of petitioner by respondent Secretary "was in no way arbitrary or lacking in due process" and that petitioner had been "legally discharged even though the proceedings were improperly labelled" as a security proceeding; (b) that one of the grounds of dismissal furnished a "clear basis" for the Secretary's action in removing petitioner, namely untrustworthiness, and that courts properly refuse to review the evidence or to examine the merits of an executive finding of untrustworthiness; (c) that a charge of untrustworthiness survives the voluntary expunging from the record of "any adverse findings" under a security proceeding; (d) that the removal of petitioner was not limited by the Act of August 26, 1950, or any other statute or regulations; and (e) that the maximum relief to which petitioner would be entitled would be the expunging of the record, which had already occurred, and that petitioner in no event would be entitled to reinstatement.

The dissent by Judge Fahy found that the charge of untrustworthiness could not be read "as in any sense independent" of the expunged charges which had been made under E. O. 10450 and the Act of August 26, 1950; that under the ruling of this Court in *Cole* "the basis for the original termination disappears, and with it the validity of that termination"; and that the second termination notice "could not relate back as attempted."

SUMMARY OF ARGUMENT

The prime issue here presented is the scope of the constitutional rights of an American educator to pursue his profession of teaching free of any "improper labelling" with a "badge of infamy" as a consequence of his removal as a so-called "security risk" from an admittedly non-sensitive position by the Secretary of the Interior in

1954. The issue is constitutional rather than statutory because petitioner lacks job protection under the Lloyd-LaFollette Act, the Veteran's Preference Act or the Foreign Service Act. He has a modicum of rights under the Act of August 26, 1950, even though the summary powers conferred upon the Executive under that Act were limited to employees holding sensitive positions, because the Secretary of the Interior applied that Act to him in the first instance and in justice he then should be entitled to the remedial provisions of that Act, e. g., authorization for back pay. *Leiner* v. *United States*, —— Ct. Cls. —— No. 376-57, October 8, 1958.

The Government argued below, and the courts below upheld the Government, that this Court's decision in *Cole* v. *Young*, 351 U. S. 536, 100 L. Ed., 1396, 76 S. Ct., 861 (1956), that a Governmental employee in a non-sensitive position could not be summarily removed under the Act of August 26, 1950, does not avail petitioner because his position in the Department of the Interior was excepted from the classified civil service and because he was not a veteran; and accordingly, the Government argued successfully in the courts below that petitioner had no rights under either statute or a departmental regulation which were violated by his removal.

Petitioner's argument on this appeal is four fold:

1. Petitioner has a constitutional right not to be defamed without lawful authority. An unjustified branding of him as a "security risk" was and has remained defamatory of petitioner in the pursuit of his professional calling, unless such defamation can be justified by a plea of the truth in a due-process hearing. Here respondents have no plea of "truth", for the record of the so-called security hearing is devoid of any evidence against petitioner. The only evidence of record in that hearing is favorable to the petitioner.

2. Having voluntarily expunged the official records of all statements adverse to petitioner, respondent Secretary lacked a rational foundation of record for finding petitioner to be untrustworthy. The court below said that charges of untrustworthiness and deliberate misrepresentation were ample grounds for removal and that these grounds were found to have been sustained on the evidence before respondent Secretary. But since the record has already been voluntarily expunged of all adverse findings made with respect to petitioner, what then can be said to remain in justification of the removal action by respondent Secretary? If the Government were then to contend that it had a general right of dismissal without giving any ground and that this right was exercised to remove petitioner, the question is raised when was such a right exercised? Certainly it was not exercised when petitioner was fired as a "security risk" in 1954.

3. When respondent Secretary issued Department Order 2738 and by its terms made it applicable to *all* "security" removals, respondent Secretary thereby limited whatever rights he might otherwise have possessed to remove employees on security grounds, as was held by this Court in *Service* v. *Dulles*, 354 U. S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152 (1957). The effort of the court below to distinguish *Service* from petitioner is hard to follow because this Court reversed the Court of Appeals and remanded *Service* to the District Court with the result that Service was reinstated and still is an official of the Department of State. Respondent Secretary could have made a choice of simply removing petitioner without charges, without a hearing, and without infamy, or of removing petitioner on security grounds. When he chose to remove petitioner on security grounds, he was bound to comply with his own regulations which were then applicable to security removals. The record shows that the removal of petitioner was contrary to those regulations in that the charges were not worded with sufficient

specificity, that the security hearing board failed to exercise an independent judgment in making its recommendation to respondent Secretary and that respondent Secretary refused to inform petitioner of the basis for the recommendation or action. A concededly loyal educator cannot be defamatorily removed from a non-sensitive position after a security hearing solely on the basis of undisclosed information furnished by secret informants.

4. Having ordered the removal of petitioner on security grounds, respondent Secretary cannot subsequently sustain his action on entirely unrelated grounds which were never invoked until two years after petitioner's removal. Under our judicial system, the test of the lawfulness of an action is in terms of what was actually done and not what could have been done. In this regard the alterations of the personnel record smacks of a Orwellian rewriting of history.

On each or all of the above reasons, petitioner is entitled to reinstatement to his position in the Department of the Interior, with all the rights and privileges pertaining thereto.

THE ARGUMENT

At the outset petitioner readily concedes that, as an overseas "Schedule A" employee, he held a position excepted from the classified civil service and accordingly lacked tenure under the Lloyd-LaFollette Act, that he has no rights under the Veteran's Preference Act, and is not in any manner covered by the Foreign Service Act. Absent the security regulations of the Department of the Interior, petitioner would not be disposed to question the authority of respondent Secretary to have removed him without the filing of charges, without hearing or other procedures and—be it carefully noted—without infamy to himself or his family.

This case does not present any question of the power of the head of a governmental department to discharge

an employee considered unsuitable without charge or a hearing. Such an employee lacking statutory job protection may be reassigned, demoted, or discharged for no reasons at all. Respondent Secretary could have done so in this case. He did not do so. What respondent Secretary did was to initiate a formidable proceeding for the proclaimed purpose of determining whether petitioner's removal was required by "national security." The issue here is whether respondent Secretary can defame and stigmatize petitioner as a threat to the security of his country through following the formalities of an adjudicatory proceeding without observing the most elementary requirements of a fair hearing.

Nor does this case involve the right of respondent Secretary to use secret information in the course of personnel management. The issue here is whether respondent Secretary, while relying on the formalities of a security hearing, can use confidential information from anonymous informants for the purpose of condemning petitioner as a *security risk* in a situation where whatever security interests may have been involved could have been readily satisfied by simply dismissing petitioner without charges and without the formalities of a so-called security hearing.

The posture of respondents is, apparently what while the suspension and removal of petitioner under the authory of E. O. 10450 was concededly not authorized by the Act of August 26, 1950, as that Act has been construed by *Cole*, the then Secretary of the Interior had general removal authority, and so long as the personnel documents *now* in the files of the Executive show on their face that petitioner had been removed without any reference to his removal as a "*security risk*" under the procedures of Executive Order 10,450, petitioner has no further grounds for relief.

The views of petitioner are to the contrary and are based on his rights under the Constitution, which are the

principal issue on this appeal, his remedial rights under the Act of August 26, 1950, and Department Order 2768, and his rights under the principles of administrative law.

ARGUMENT I

The defamatory dismissal of petitioner under the wrongful authority and without any basis of record was no mere error in "labelling", as held by the court below, but violated petitioner's constitutional rights to pursue his professional calling free of any "badge of infamy."

The right of a professional man to follow his calling, for which he has been trained and recognized by the competent authorities, is a property right entitled to due-process protection by the courts, unless he has forfeited such protection by some act or habit that would justifiably bar him from the educational field. *Truax* v. *Raich*, 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7 (1915). These due-process standards and procedures have been applied to the revocation of professional licenses of lawyers, seamen, insurance agents, and professional bondsmen.[11]

The unique position of teachers as the "Priests of Democracy" has already been underscored by Mr. Justice Frankfurter in his concurring opinion in *Wieman* v. *Updegraff*, 344 U. S. 183, 196-97 97 L. Ed. 216, 73 S. Ct. 215 (1952) where he said:

> "It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which

---

[11] *In re Isserman*, 348 U. S. 1, 99 L. Ed. 32, 75 S. Ct. 6 (1954); *Parker* v. *Lester*, 227 F. 2d 709 (9th Cir. 1955); *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 70 L. Ed. 494, 46 S. Ct. 215 (1925); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957); *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722 (1957); *Columbia Auto Loan Co.* v. *Jordan*, 90 U. S. App. D. C. 222, 196 F. 2d 568 (1952); *In re Carter*, 89 U. S. App. D. C. 310, 192 F. 2d 15 (1951), cert. den. 342 U. S. 862, 96 L. Ed. 648, 72 S. Ct. 89.

> alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be examplars of openmindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government."

This Court has repeatedly recognized that "substantial rights affecting the lives and property of citizens are at stake" where a public employee has been removed on grounds of disloyalty or security. *Peters* v. *Hobby*, 349 U. S. 331, 347, 99 L. Ed. 1129, 75 S. Ct. 790 (1955). Dr. Peters himself held a "Schedule A" appointment, as was noted by this Court (note 24 on p. 347), the precise type of appointment held by the petitioner here.[12] In recognizing that "a badge of infamy" attaches to a public employee dismissed on grounds of disloyalty, *Peters* was but following the earlier decision of this Court in *Wieman* v. *Updegraff*, 344 U. S. 183, 190-191, 97 L. Ed. 216, 73 S. Ct. 215 (1952). Distinguishing its earlier decison in *Adler* v. *The Board of Education*, 342 U. S., 485, 96 L. Ed., 517, 72 S. Ct. 380 (1952) which had held that persons seeking

---

[12] Dr. Peters held a term appointment which by its own terms had expired at the time of this Court's decision, which rendered moot the matter of reinstatement; and his claim for compensation could only be for time actually worked, which rendered moot the question of back pay. Here petitioner, however, held an indefinite appointment of a full-time position.

employment in the New York Public Schools had "no right to work for the State and the School system on their own terms," this Court in *Wieman* pointed out:

> "To draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. • • • We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extent to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

Even though it may be conceded as an abstract proposition that petitioner may have had no constitutional right to work for the Department of the Interior, it is submitted that having once been so employed as an educational officer, he thereby acquired a substantive right of property in "a species of tenure and cannot be capriciously excluded and thereby injured financially and profesionally." *Alpert* v. *Board of Governors*, 286 App. Div. 542, 145 N.Y.S. 2d 534 (1955).

The court below recognized the force of the above decisions when it concluded that "Persons situated as was the appellant are, we may assume, entitled to be free from dismissal on unconstitutional or flagrantly arbitrary grounds." R. 41. But then it went on to hold that "no such dismissal occurred here" and that the "treatment accorded appellant was in no way arbitrary, or lacking in due process. He was given written charges, and an opportunity to answer them, together with a hearing." R. 42 The court below relied heavily[13] on its own decision in *Bailey* v. *Richardson*, 86 U. S. App. D. C. 248, 182 F. 2d 46, affirmed by an equal division in this Court, 341 U.S. 918, 95 L. Ed. 1352, 71 S. Ct. 669 (1951). It also pointed out that in both *Cole* and *Service* this Court had based its decision on "Congressional restrictions" on

[13] See court's "emphasis added" in its note 3, R. 42.

dismissals, whereas in this case there were no such legislative retrictions applicable to the removal of petitioner. In effect, the court below held that petitioner had no constitutional rights unless they were implemented by some Congressional authorization or restriction.

The affirmation of *Bailey* by an equal division of this Court was done on premises which have since been clearly rejected by this Court in *Peters* and *Wieman*. The cornerstone of *Bailey* was the ruling that "the due process clause does not apply to the holding of a government office" and that there is no basic right to Government employ (182 F. 2d 57, 60-61), but *Peters* and *Wieman* clearly held to the contrary. Nor did *Bailey* deem the stigma of disloyalty discharge distinctive from discharge on other grounds (*at.* p. 64), while this Court has emphasized the unique and terrible consequences following from an adjudication that an employee is disloyal or that his continued employment will adversely affect the national security of the United States. Unless *Bailey* is explicitly overruled, it will remain at the core of the constitutional problem in security cases, especially in lower courts, which have been prone to let justice in this area depend upon appeal to this Court.

As long as this removal of petitioner, a highly trained educator, from the Government service as a "security risk" is permitted to stand without his reinstatement, it blights the lives of petitioner, his wife, and the children who bear his name. If respondents object that petitioner was not removed on grounds of disloyalty but only on grounds of security, the short and unhappy answer is that the public draws no such distinction. Nor has it drawn a distinction between a security risk dismissal, which was permitted to stand for two years, and a predated dismissal for unstated reasons. The stain is still upon the petitioner. It has been impossible for him to secure any position in the educational field commensurate

with his professional training. It has been necessary for him for many months to work as a construction worker and not as an educator. These are consequences to petitioner's life, to his family and to his property which ought not to be visited upon him except in pursuance of some lawful justification. As this Court said long ago:

> " * * * the very idea that one man say be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo.* v. *Hopkins,* 118 U. S. 356, 360, 30 L. Ed. 220 6 S. Ct. 1064 (1886):

ARGUMENT II

Where respondents voluntarily expunged the record of all statements adverse to petitioner, their removal of petitioner cannot subsequently be justified on the ground that the record furnished a "rational" foundation for finding petitioner untrustworthy.

The court below found that the dismissal of petitioner by respondent Secretary had both a "rational" foundation and a "sufficient 'statutory' foundation—the constitutional power of the executive to dismiss subordinates: a power not limited in the present instant by statute or regulation." R. 42. Citing *Second Chenery* that an agency's "conclusion will be disturbed only if it lacks a rational and statutory foundation," *Securities and Exchange Commission* v. *Chenery Corporation,* 332 U. S. 194, 207, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947), the court below held that petitioner had been legally discharged. It cited as its reason that *inter alia,* one of the grounds for dismissal listed in the letter of charges "furnishes a clear basis for the Secretary's action" and quoted the charge that was set forth in numbered paragraph 3 of the letter of charges. R. 43. The court below further reasoned that the charge of untrustworthiness was sufficient to justify

a discharge "even under the herein applicable Lloyd-LaFollette and Veterans Acts," and noted (in footnote 6) further that the "circumstance that the fair gound of dismissal was intimately related to the first [security] ground would seem immaterial here." In the dissent, however, Judge Fahy pointed out that charge 3 or any finding based thereon, could not be read independently of E. O. 10450 or the Act of August 26, 1950. R. 45. A mere reading of Charge 3 plainly shows its origin—namely §8.(i) and (ii) of E. O. 10450. Appendix A. p. 39.

At one moment the court below emphasized its affirmance of the dismissal of petitioner's complaint on the grounds that all relief had already been extended him, namely the expunging the record, and in the next moment held that petitioner was discharged lawfully because the record shows that he was untrustworthy, as found by respondent Secretary on the record. Since the matters expunged were described as "all", it necessarily must follow that nothing of substance in the letter of charges remained in the official personnel records of respondents. And this expunging of the record was presumably a voluntary action by respondents! If the record was expunged of all statements adverse to petitioner, as respondents and the courts below have recited, then the record no longer contains any statement "adverse" to petitioner. That being so, the record can no longer be relied upon to sustain a removal action on grounds which have already been expunged. The reasoning of the court below is indeed suggestive of the lasting stain of a so-called "security risk" label, however mislabelled petitioner may have been. This stain is still here sufficiently for an appellate court to conclude that respondents had a rational foundation for their action against petitioner even after respondents had voluntarily expunged the record of the stain.

ARGUMENT III

At the time of petitioner's suspension and removal, respondent Secretary had limited his authority to remove petitioner as a "security risk" only in accordance with his own departmental security regulations.

Under Department Order 2733 (dated November 9, 1953) respondent Secretary provided that any employee suspended on security grounds would be removed exclusively pursuant to the proceedures of those regulations (Appendix A, pp. 41-42). This appears abundantly clear from §1 of the order which states that it is imperative that *all* persons in the employ of the Department of the Interior shall meet the minimum requirements of national security; from §3 which states that the policy of the department is that no person shall be employed unless such employment is clearly consistent with the interest of the national security; from §6(c) which contains an express exemption for temporary and intermittent employees having a term of employment of six months or less; and from §13 relating to the termination of temporary or probationary or trial employees. The implication is clear beyond any doubt that *all* [14] other employees, whether holding permanent or indefinite appointments, were subject to the security regulations of the Department of the Interior.

From the above recital it must be clear beyond any cavil that respondent Secretary—whatever his authority might have been in the absence of these Departmental security regulations—had limited himself in effecting the removal of any employee on security grounds to effect such removal only according to the procedural safeguards

[14] This was the theory not only of the Department of the Interior but of the entire Executive Branch under E. O. 10450 until this Court decided otherwise in *Cole* v. *Young*, and was once the prevailing theory of the court below. *Cole* v. *Young*, 96 U. S. App. D. C. 379, 266 F. 2d 337 (1955).

of those regulations. In the words of this Court in *Service*, "Having done so he could not, so long as the regulations remain unchanged, proceed without regard to them." Contrary to the proceedings followed against *Service*, petitioner was informed by respondent Secretary that his case was being *exclusively* considered under the Departmental security regulations. Every contemporaneous official statement with respect to the termination of petitioner's employment denotes that the determination to remove him and the termination itself were made under the security order and no other authority.

As a governmental employee who had satisfactorily served his probational period, petitioner under the Departmental security regulations was entitled upon his suspension "in the interest of national security" to:

(1) "A written statement of charges . . . as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit . . ." [§15(a)];

(2) "A hearing before a security hearing board [which shall conduct hearings] in an orderly manner . . . and insure the employee of a full and fair consideration of his case . . . [including the right] to cross-examine any witness offered in support of the charges." [§21(a) and (c)]; and

(3) "A written statement of the decision of the Secretary" [§16(d)].

A. The security charges furnished petitioner were not sufficiently specific in their wording to enable petitioner, on the assumption of innocence, to defend himself. As already related, *supra*, p. 8, it was conceded on the record of the security hearing that petitioner is and has always been loyal to the government of the United States. That being so, the only charges remaining against petitioner were as follows:

"That in fact your associations with the said F—— were not fully divulged by you and that same were not casual but on the contrary were the associations of an intimate friendship; that in fact your associations with the said W—— were not fully divulged by you in that such associations were not solely connected with your teaching profession; and that you did know that both the said F—— and the said W—— were members of, affiliated with, or in sympathetic association with the Communist Party and numerous Communist front organizations.

* * * *

"3. Your behavior, activities and associations tend to show that you are not reliable or trustworthy, and and the facts above alleged furnish reason to believe that you have deliberately misrepresented, falsified or omitted material facts in connection with your said behavior, activities and associations, and that these facts also furnish reason to believe that you may be subjected to coercion, influence, or pressure which may cause you to act contrary to the best interests of national security." R. 5-6.

Elemental fairness requires that charges preferred against a governmental employee for his removal must be "specific enough to provide a fair opportunity for refutation by the innocent who have no knowledge of the conduct charged, as well as the guilty who do possess such knowledge." *Money* v. *Anderson*, 93 U. S. App. D. C. 226, 208 F. 2d 34, 37-38 (1953).[15] While *Money* arose under the Lloyd-LaFollette Act, which is limited to "classified" employees, its standard of fairness in testing the specificity of charges is plainly applicable to other removal cases, such as this action involving petitioner. Note that a similar ruling made in an early "security risk" dismissal case under a 1942 appropriation Act is *Deak* v. *Pace*, 88 U. S. App. D. C., 50, 185 F 2d 997 (1950).

---

[15] Followed in *Manning* v. *Stevens*, 208 F. 2d. 827 (D. C., 1953). Also see *Robert J. Morgan*, "Federal Loyalty-Security Removals, 1946-1956." 36 Nebraska Law Review 412-46 (1951).

The Court of Claims has reached the same result in *Blackmar* v. *United States*, 128 Ct. Cl. 693, 120 F Supp. 408 (1954).

In *Simmons* v. *United States*, 348 U. S. 397, 405, 99 L. Ed. 453, 75 S. Ct. 397, (1955), this Court warned that a hearing for conscientious objectors under the Universal Military Training and Service Act was not intended by Congress to be "conducted on the level of a game of blindman's bluff," but rather that petitioner was entitled to a "fair resume" of FBI reports which would permit

> "the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force. The remarks of the hearing officer at most amounted to vague hints, and these apparently failed to alert the petitioner to the dangers ahead. Certainly they afforded no fair notice of the adverse charges in the report."

A charge that petitioner had not told the entire truth concerning his relationship with certain individuals is clearly not sufficiently specific if it does not specify the times, places, and type of "close association" that have allegedly been omitted. If the petitioner told the whole truth in stating his entire knowledge of the situation, how can he respond to a charge that he has left out some unstated matter, if that matter does not exist?

B. A concededly loyal educator cannot be removed from a non-sensitive position after a hearing solely upon the basis of undisclosed information furnished by secret informants. There is no dispute that the security hearing board in recommending adversely concerning petitioner relied upon undisclosed information furnished by secret informants; that petitioner was not informed of the specific contents of such information and was not afforded an opportunity to inspect or refute such information; that petitioner was not informed of the identity of various informants or whether such informants had testified under

oath or whether the information supplied by such informants was based upon hearsay; that petitioner was denied an opportunity to face and cross-examine the informants; and that respondent Secretary relied thereon in removing petitioner.

Under our Constitution " . . . there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute." *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 93, 57 L. Ed. 431, 33 S. Ct. 185 (1913). This Court has repeatedly held that "where the disclosure of an informant's identity, or the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro* v. *United States*, 353 U. S. 53, 60-61, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957); *Jencks* v. *United States*, 353 U. S. 657, 1 L. Ed. 2d 1103, 77 S. Ct. 1007 (1957). While these cases involved criminal prosecutions, they stand broadly for the proposition that a party threatened with the deprivation of substantial rights, as is any party involved in a proceeding which may result in his being labelled a "security risk", is entitled to the fullest opportunity to defend himself. This is no new doctrine. In *Morgan* v. *The United States*, 304 U. S. 1, 82, L. Ed. 1129, 58 S. Ct. 773 (1938), this Court said, "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

In the absence of findings of fact, there is no way to know which of several conflicting official explanations led to petitioner's removal—whether it was his pacificism as publicly stated to the press, whether it was based on the charges as stated in respondent Secretary's final determination, whether it was based upon some undisclosed charges as stated by the solicitor of the Department of

the Interior, or whether it was based on petitioner's alleged "lack of common sense" as stated by the personnel officer, or even upon no charges at all. R. 11-12. This Court has already drawn attention to the fact that a security hearing

> "convicts on evidence which it cannot even appraise. The critical evidence may be words of an unknown witness who is 'a paragon of veracity, knave, or the village idiot.' His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judges and to the accused. The accused has no opportunity to show that the witness lied or was prejudiced or venal." Concurring opinion by Mr. Justice Douglas in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 180 95 L. Ed. 817." S. Ct. 624 (1951).

Also in *Peters* Mr. Justice Douglas, concurring, stated that sources of information used to destroy a man's reputation "must be put to the test of due process of law" and that no faceless informer may deprive a person of one of "man's most precious liberties . . . his right to work."

C. The so-called hearing was not a fair hearing. On the face of the transcript of hearing (*supra*, pp. 8-9), it is abundantly evident that the so-called security hearing board and security officer wandered far afield, without any discernible standards of relevance or materiality, from the matter set forth in the letter of charges. Probably the most colorful illustration of the kind of hearing afforded petitioner in 1954 is given in the following exchanges with respect to his votes for President of the United States in 1940 and 1948:

> "Mr. Armstrong [assistant solicitor and security officer for the Department of the Interior]: I think you indicated in an answer or a reply to an interrogatory that you at times voted for and sponsored the principles of Franklin Delano Roosevelt, Norman A. Thomas, and Henry Wallace?
> Mr. Vitarelli: That is correct.

Mr. Armstrong: Norman Thomas was one of those perennial candidates on the Socialist ticket for President.

Mr. Vitarelli: That is right.

Mr. Armstrong: How many times did you vote for him if you care to say?

Mr. Vitarelli: I never voted for Norman Thomas that I remember. I may have been in favor of a lot of his poliices, but I don't remember voting for Norman Thomas.

Mr. Armstrong: How about Henry Wallace?

Mr. Vitarelli: I voted for Henry Wallace once.

Mr. Armstrong: Back in 1948?

Mr. Vitarelli: That is correct.

Chairman Towson [Chairman of the security hearing board]: Just one question on that. Did you not vote for Henry Wallace when he was a candidate for vice-president?

Mr. Vitarelli: Yes, I did.

Chairman Towson: Then you voted from him once more, more than once?

Mr. Vitarelli: That is true. I voted for the Roosevelt New Deal regime of which he was a member; that is true."

Thus did the security hearing board chairman test petitioner's trustworthiness in having stated under oath that he had once voted for Wallace!

D. Petitioner was not furnished with findings of fact or a written statement of the decision to remove him "in the interest of the national security," nor was he informed which specific charge, if any, had been used as a basis for effecting his removal.

The only notification received by petitioner was a letter of "Findings and Determinations" under date of September 2, 1954, (R. 29-31). Nor was petitioner ever given a copy of the recommended decision of the so-called security hearing board. This was contrary to the constitutional requirements of a fair hearing as laid down in *Gonzales v. United States*, 348 U. S. 407, 99 L. Ed. 467, 75 S. Ct.

409 (1955), where this Court, notwithstanding the silence of the Universal Military Training and Service Act, held that a conscientious objector was entitled to a copy of the advisory recommendations of the Department of Justice to the Appeal Board and a reasonable opportunity to reply thereto.

> "Just as the right to a hearing means the right to a meaningful hearing, *United States* v. *Nugent, supra; Simons* v. *United States, supra,* so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendation and arguments to be countered."

Under the logic of this holding, petitioner should have been given a copy of the recommended decision of the so-called security hearing board prior to the final findings and determinations by the then Secretary of the Interior.

As appears from the face of the letter of termination, the findings by the then Secretary of the Interior on the basis of which he purported to order the removal of petitioner did not specify which charges were the basis of petitioner's removal. This lack of specific findings is plainly contrary to *Mulligan* v. *Andrews*, 93 U. S. App. D. C. 381, 211 F. 2d 28, 30, 31 (1954), where the court said:

> "The purpose of requiring this content for the 'reasons' for removal is not to provide a record to facilitate judicial review of such 'reasons' on their merits since review is narrowly limited by the absence of express statutory provision therefor. On the contrary, it is required as a procedural safeguard against just the sort of errors which, if committed at the administrative level, are beyond reach of our review."

To the same effect is the loyalty case of a veteran in *Kutcher* v. *Higley*, 98 U. S. App. D. C. 278, 235 F. 2d 505 (1956) where the court said:

"Since only findings on the charges, specifically identified, can constitute reasons for removal, a reading of the charges must demonstrate the reasons for removal, assuming all the charges are sustained. This is not so here. The first charge . . . could not constitute a valid reason for dismissal. * * * The second charge . . . was not a reason nor, standing alone, even an important detail of the reasons for dismissal. * * * No findings whatever were made specifically relating to this [third] charge.

"The fourth charge was . . . wholly vague. It might be taken merely as a summary of the three preceding charges. If so, it adds nothing to the case against Kutcher. It might also be taken as a broad and sweeping charge embracing numerous unspecified activities and associations. If so, it was too vague and lacks even the specificity this court held necessary in *Deak* v. *Pace, supra.*"

Applying the tests of *Mulligan* and *Kutcher* to the removal of petitioner by respondent Secretary, it is plain that the letter memorandum of respondent Secretary does not comport with this kind of specific finding.[16] Since respondents have conceded that no considerations of "national security," as that term has been judicially interpreted in *Cole*, operate in this case, then it follows that respondent Secretary lacked lawful justification for making such a vague finding.

ARGUMENT IV

Where the legal basis contemporaneously used to remove petitioner fails, as here conceded, the removal itself must fail, and petitioner is entitled to reinstatement, notwithstanding his lack of statutory job protection.

The formal letter of charges preferred against petitioner by respondent Secretary represented to petitioner in unmistakable terms that the determination as to the

[16] The contrary rule of *Cole* v. *Young*, 96 U.S. App. D. C. 379, 226 F. 2d 377 (1955) is of doubtful validity in view of its reversal by this Court.

necessity or advisability of the termination of his employment "in the interest of the United States" would follow upon the recommendation of the so-called security hearing board as to whether petitioner was a "security risk." R. 3-6. This letter specifically referred to the security regulations of the Department of the Interior, which had been issued pursuant to E. O. 10450, and a copy of such regulations was specifically attached to the letter of charges. The phrasing of the charges shows that they were based on §4 of these regulations; the so-called hearing was scheduled under §17 of those regulations; and the hearing paraphernalia generally appeared to be authorized under §§ 19 and 21 of the regulations, subject to the defects already noted above, supra, pp. 24-32.

Petitioner was removed from his employment of the Department of the Interior under a letter of findings and determinations by the Secretary of the Interior, dated September 2, 1954 (R. 29-31). This letter recited on its face that written charges had been proffered against petitioner under the authority of Executive Order 10450 and the Act of August 26, 1950, that these charges had led to the suspension of petitioner as "necessary in the interests of national security," that a hearing had been held before a board of "three disinterested employees of other agencies," that such board had recommended that "the employment of William Vincent Vitarelli is not clearly consistent with the interests of national security," and that after a careful review had been made of the case, the then Secretary of the Interior found:

> "it advisable and necessary that the employment of William Vincent Vitarelli should be terminated in the interests of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954.
>
> "IT IS THEREFORE, DETERMINED AND ORDERED, that the employment of William Vincent Vitarelli, an employee of this Department of the In-

terior, be, and the same is hereby terminated in the interests of the national security at the close of business on September 10, 1954."

Standard Form 50 of the United States Civil Service Commission, entitled Notification of Personnel Action, was issued on September 24, 1954, and recited that the action of "TERMINATION" of the employment of petitioner was "being taken in accordance with the provisions of Executive Order 10450." (R. 31-32). The record also contains another form 50 (R. 33-34) which is similar in all respects to the Form 50 on R. 31-32 except that the reference to action taken under the provisions of Executive Order 10450 is stricken and a statement is added that this second form is in replacement of a prior form. Otherwise the two forms are identical. Although there is nothing on the face of the other Form 50 (R. 33-34) to indicate that it was executed on any other date than the date of the first Form 50 (R. 31-32), which was September 24, 1954, the second form, as a matter of fact, was executed sometime in September, 1956. This is an example of an Orwellian act of rewriting history which does not, of course, alter the fact that petitioner had nevertheless been removed by the then Secretary of the Interior as a so-called "security risk" under E. O. 10450 and had been defamed in that respect from 1954.

Not until the Government's answer and supporting memorandum was filed in the District Court in 1956 was there any suggestion that petitioner was removed as a "Schedule A" employee quite independently of E. O. 10,450 and the departmental security regulation under which the removal as a security risk was purportedly made in 1954. Essentially, the Government's argument is that the security charges, the so-called hearing and the security procedures were wholly immaterial to petitioner's removal. The argument, however, is squarely contradicted by every relevant word of the contemporaneous record

and flies in the teeth of every document signed by respondent Secretary with respect to the termination of petitioner in 1954.

Whether or not respondent Secretary could otherwise have removed petitioner without charges, hearing, evidence or reason, the fact is that he did not do so, but purported to extend the procedural protection of E. O. 10,450 and the departmental regulations pursuant thereto. Counsel for respondent Secretary in the course of the pleadings in the District Court argued that the only issue properly before the court were the methods in fact employed by respondent Secretary in discharging the petitioner, supra, p. 11. This would appear to mean that any other justification than those recited on the face of these documents is not available to the respondent Secretary in this action.

It is well established in law that where an administrative agency purports to act under certain authority or standards, its actions must be weighed in accordance with such announced authority or standards. *Securities and Exchange Commission* v. *Chenery Corporation*, 319 U. S. 80, 87, 95, 87 L. Ed. 626, 63 S. Ct. 454 (1943). Executive discretion which is based solely upon unlawful considerations is an abuse of discretion, and should under the decisions of this Court have been set aside by the District Court. *Perkins* v. *Elg*, 307 U. S. 325, 83 L. Ed. 1320, 59 S. Ct. 884 (1939), where this Court said:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based. * * * An administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained."

Plainly a justification in terms of what respondent Secretary *might have done*, if he had been so lawfully minded, is, and can be, no justification in a United States

court exercising the judicial power under the Constitution of the United States. As Mr. Justice Stone has said, "It is the Court's considered practice not to decide abstract, hypothetical or contingent questions." *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945).

It is now universally agreed by all parties that respondent Secretary lacked the legal authority to act under that E. O. 10,450 or the Act of August 26, 1950, inasmuch as petitioner's position had never been classified as a "sensitive position." It consequently follows that the removal of petitioner was unlawful under the authority used in fact; nor can the removal be defended at this time on the conjectural grounds that the respondent Secretary could have removed petitioner as a "Schedule A" employee and that removal would not have been reviewable in court. The fact of the matter is that respondent Secretary never did so so long as petitioner was an employee of the Department of the Interior. Neither logic nor justice should bar petitioner's reinstatement because he lacks civil-service tenure. As has been shown above, a governmental employee, without regard to tenure has a constitutional right against being tarred with a "badge of infamy" which is the inevitable practical result where he is removed as a security risk according to the wrong procedures and the wrong reasons. Such a tarring directly and seriously prejudices his eligibility to professional employment and the development of his career.

CONCLUSION

In removing petitioner, the Secretary of the Interior acted unjustly, arbitrarily, and unlawfully. Petitioner has been subjected to an intensive inquisition into his personal affairs. His professional reputation has been so tarred that he has been unable to find a job in teaching.

For the foregoing reasons, it is respectfully submitted that the judgment of the courts below should be reversed and the cause remanded to the District Court for the granting of the relief prayed by petitioner in this complaint.

Respectfully submitted,

CLIFFORD J. HYNNING
1821 Jefferson Place, N. W.
Washington 6, D. C.
Counsel for Petitioner

Of Counsel:
HARRY E. SPROGELL
SAUL, EWING, REMICK & SAUL
Packard Building
Philadelphia 2, Pa.

APPENDIX A

AMENDMENT 5

To The Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

EXECUTIVE ORDER 10450

SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, et seq.); section 9 A of the Act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, et seq.), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

* * * * *

Section 8(a). The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

* * * * *

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
April 27, 1953.

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of the Secretary
Washington

ORDER No. 2738 November 9, 1953

Subject: Security Regulations

GENERAL

Sec. 1 Purpose.
2 Definitions.

SECURITY REQUIREMENTS FOR EMPLOYMENT

3 Policy.
4 Standards.
5 Security Classification of Positions.
6 Security Investigations.
7 Re-employment of Employee Terminated as Security Risk.
8 Review of Full Field Investigations Conducted under Executive Order 9835.
9 Accessibility to Confidential Security Information.
10 Clearance for Non-sensitive Positions.
11 Clearance for Sensitive Positions.
12 Action of the Director of Security.
13 Termination of Temporary and Probationary or Trial Employees.
14 Criteria for Suspension or Reassignment.
15 Notification to Employee of Suspension or Reassignment.
16 Appeal Procedure.
17 Further Appeal Rights.
18 Pay and Restoration of Pay of Suspended Employees.
19 Establishment of Security Hearing Board.
20 Functions with Respect to Security Hearing Board.
21 Hearing Procedure.
22 Revocations.

GENERAL

Sec. 1 *Purpose.*

(a) If the duly constituted Government and the national Security of the United States are to be protected and made secure, it is imperative that all persons engaged in any capacity in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States. This order is issued so that the Department of the Interior may have a program designed to insure that the personnel in its employment meet the minimum requirements considered necessary to protect and make secure the Government and the national security.

(b) The regulations in this order are designed to achieve two objectives: first, to make sure that all employees are unquestionably and trustworthy in their capacity as citizens engaged in government activities conducted under our constitutional form of government, second, to guard security information or material, the disclosure of which, would have an adverse effect on national security.

(c) This order prescribes for all bureaus and offices of the Department the procedures, standards and criteria for carrying out these objectives and are issued in accordance with the act of August 26, 1950 (5 U.S.C. 1946 ed., Supp. V, secs. 22-1, 22-2, 22-3), and Executive Order 10450 of April 27, 1953 (18 F. R. 2489), as amended.

• • • • •

Sec. 3. *Policy.*

(a) It shall be the policy of the Department, based on the act of August 26, 1950 (64 Stat. 476) and Executive Order No. 10450 of April 27, 1953, as amended, to employ and to retain in employment only those persons who

are reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States in their capacity as citizens engaged in government activities conducted under the constitutional form of Government of the United States.

(b) No person shall be employed, or retained as an employee, in the department unless the employment of such person is clearly consistent with the interests of the national security.

• • • •

Sec. 6. *Security Investigations.*

(c) *Temporary and Intermittent Employees.* Certain employees in non-sensitive positions whose term of employment is for 6 months or less are, subject to the approval of the Civil Service Commission, exempted from the investigations normally required for non-sensitive positions. Special instructions will be issued concerning such employees by the Director of Security.

• • • •

Sec. 13. *Termination of Temporary and Probationary or Trial Employees.* The regulations in this order are not intended to take away any authority which the appointing officer may have to terminate, for cause, temporary and probationary or trial employees.

Sec. 15. *Notification to Employee of Suspension or Reassignment.*

(a) A written statement of charges shall be furnished the employee within 30 days after his suspension or temporary reassignment. The statement shall also inform the employee of his privileges under sec. 16 and if appropriate Sec. 17 of this order. This statement shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit, and shall be subject to amendment within 30 days of issuance.

(b) A copy of these regulations shall accompany the statement furnished the employee. The text of Executive Order 10450 and the act of August 26, 1950, are included in these regulations as Appendix C and D respectively.

Sec. 16. *Appeal Procedure.*

(a) An employee shall be afforded an opportunity to submit affidavits and statements and to answer such charges within 30 days after the receipt of the statement of such charges, or within 30 days after the receipt of an amendment thereof.

(b) Statements in refutation of the charges and supporting documents shall be considered by the Security Legal Officer and the Director of Security, who shall make a joint recommendation to the Secretary for the disposition of the case. If the Security Legal Officer and Director of Security are in disagreement, individual recommendations shall be made by them.

(c) Final decision as to termination of the employee will be made by the Secretary.

(d) A written statement of the decision of the Secretary shall be furnished the employee.

(e) Copies of notices of all personnel actions taken in the case shall be supplied by the bureau or office to the Civil Service Commission.

Sec. 17. *Further Appeal Rights. Permanent or Indefinite Employees.* An employee who is suspended or temporarily reassigned and who is a citizen of the United States and has a permanent or indefinite appointment and has completed his probationary or trial period shall, if he requests, be given a hearing before a security hearing board, constituted and conducting hearings as provided in this order. The decision of the hearing board will be reviewed and considered by the Secretary before a deter-

mination is made with respect to the termination of the employee.

• • • •

Sec. 21. *Hearing Procedure.* The following hearing procedure shall be strictly adhered to:

(a) Hearings before security hearing boards shall be conducted in an orderly manner and shall be expedited as much as possible.

(b) Testimony before the hearing board shall be given under oath or affirmation.

(c) The hearing board shall take whatever action is necessary to insure the employee of a full and fair consideration of his case. The employee shall be informed by the board of his right:

(1) To participate in the hearings;

(2) To be represented by counsel of his choice;

(3) To present witness and offer other evidence in his behalf and in refutation of the charges brought against him; and

(4) To cross-examine any witness offered in support of the charges.

• • • •

(e) Both the Department and the employee may introduce such evidence as the hearing board may deem proper in the particular case. Rules of evidence shall not be binding on the board, but reasonable restrictions shall be imposed as to relevancy, competency, and materiality of matters considered, so that the hearings shall not be unduly prolonged. If the employee is or may be handicapped by the non-disclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration. If a person who has made charges against the employee and who is not a confidential in-

formant is called as a witness but does not appear and refuses either to permit his deposition to be taken or to answer written interrogatories, his action in this regard shall be considered by the board in evaluating such charges.

• • • •

(i) Hearing boards shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

• • • •

(k) The board shall reach its conclusions and base its determinations on the transcript of the hearing, together with such confidential information as it may have in its possession. The conclusions and recommendations of the Board with respect to the employee against whom the charges have been made should specifically include a recommendation that the services of the employee be terminated or that termination is not warranted. The board, in making its determination, shall take into consideration the inability of the employee to meet charges of which he has not been advised because of security reasons, specifically or in detail, or to attack the credibility of witnesses who do not appear. The recommendations of the board shall be in writing and shall be signed by a majority of the members of the board. The recommendations of the board, and the complete record of the case including investigative reports, shall be sent to the Secretary for use in his final review of the case.

• • • •

Sec. 22. *Revocations.* This order supersedes all previous Departmental security regulations and Secretarial Orders Nos. 2308, as amended, 2459, 2460, 2488, 2489, 2490, as amended, 2491, 2538 and sections 6 and 7 of 2609, as amended.

/s/ DOUGLAS MCKAY
Secretary of the Interior